SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938

No. 276

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

REPLY BRIEF OF APPELLANTS.

GEORGE COUPER GIBBS,
Attorney General of Florida;
TYRUS A. NORWOOD,
Assistant Attorney General of Florida;
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 276

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA ET AL.,
Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

REPLY BRIEF FOR APPELLANTS.

I.

Appellees Have Failed to Show That the Matter in Controversy is in Excess of $3,000.00.

The appellees criticize and attempt to distinguish the cases of *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; and *Pope* v. *Blanton*, 299 U. S. 521, but the same vice that infected the bills of complaint in those cases is present in the bill now before the Court. Nowhere has it been shown what it costs the appellees individually or collectively to do

business in the State of Florida, either with or without the regulations of the statute.

Appellees insist that because the court below found the matter in controversy exceeded three thousand dollars ($3,000.00), exclusive of interest and costs, this was sufficient to show Federal jurisdiction. Yet they failed, and the findings of fact (R. 276) failed to point out any facts in the record supporting this conclusion. Although the bill alleges that in 1936 the Society collected the sum of $59,306.81 from licensees for their music in the State of Florida (R. 25), nowhere is it alleged how much it cost the Society to do business in the State in 1936 or any other year. It might have cost the appellees two hundred thousand dollars a year to do business in Florida. Without this essential allegation the jurisdictional amount is not made to appear. The statute prohibits no one from doing business within the State; it merely regulates the mode of doing business. *McNutt* v. *General Motors, supra.*

Appellees urge (p. 24) that the cause of action is joint by reason of a statute of the State of New York. The legislature of a State cannot by its fiat confer upon persons having separate rights the power to combine those rights in order to give a Federal court jurisdiction, any more than individuals can aggregate their separate claims in order to establish jurisdiction—a doctrine unequivocally denied by this Court in *Pope* v. *Blanton, supra,* discussed in appellants' brief, pp. 22 and 23. However, assuming it to be a joint action, still no jurisdictional amount has been shown because nowhere is it alleged what it cost the members of the Society jointly to operate in Florida.

In a desperate, but futile, effort to show jurisdiction, appellees (brief p. 35) insist that the loss each year by reason of the Florida statute, to the three publisher appellees is in excess of $50,000 each; and the loss each year to the seven author and composer appellees is in excess of $5,000

each, a total of $185,000.00. And yet, for all of its 45,000 author, composer and publisher members and affiliates (R. 24) The Society collected in Florida only $59,306.81 in 1936.

As a matter of fact, appellees' estimated loss stated in their brief is not based upon receipts from Florida, but is based upon income derived from their activities throughout the entire world (R. 32). The record is completely silent as to the net income of any of appellees derived from Florida operations.

As a further illustration of the confusion into which appellees' efforts to establish Federal jurisdiction have plunged them, we quote the following from page 17 of their brief:

> "Since appellees *do not do business* in the State of Florida, the Statute would enable the State Courts to secure jurisdiction over them so as to deprive them of their property and subject them to the penalties of the Statute, without being personally present within the State."

If appellees do no business in Florida, by what stretch of the imagination can it be asserted that individually or collectively they lose $3,000, or any other sum, because of the restrictions of the Florida statute?

II.

Appellees' Brief Confesses the Monopolistic Activities of the Society.

Appellees' brief, instead of denying the price-fixing activities of the Society, confesses those activities and seeks to justify them by a plea of necessity (Appellees' brief, pp. 3-5, incl.).

The unsoundness of this position is fully demonstrated in appellants' main brief (pp. 47-49 incl.). Defenses that their method is necessary in order to protect copyright owners

against piracy of their property by users of copyrighted music (the remedy is contained in the Copyright Act itself by suit for infringement—see *United States* v. *Patterson, et al.*, 205 Fed. 292, 295-300; *Patterson et al.* v. *United States*, 222 Fed. 399, 645-647); that the method results in lower license fees (see *United States* v. *Trenton Potteries Company, et al.*, 273 U. S. 392, 397-398); that the method is desired by the users of copyrighted music themselves and the contract terms written by them (see *Paramount Famous Lasky Corp. et al.* v. *United States*, 282 U. S. 30, 42-44); that the method of licensing does not suppress all competition between copyrighted musical compositions or the owners thereof (see *Paramount Famous Lasky, supra*, p. 44), and all similar defenses are of no avail. "The interest of the public in the preservation of competition is the primary consideration." (*Paramount Famous Lasky, supra*, p. 44).

Much is made by appellees of the alleged selfish and dishonest motives of the users of copyrighted music in promoting the enactment of the statute (Appellees' brief, pp. 5-9, incl.). In their desperate effort to evoke a sympathetic attitude from the Court, they refer (p. 9) to pages 116-119 of the Record as demonstrating these improper motives on the part of the entertainment industries. Actually these pages of the Record refer exclusively to alleged activities of the amusement industries in *Nebraska* and have no relevance to the Florida legislation. If the whole situation is dispassionately considered, it is apparent that the objection of the entertainment industries is not to the payment for the privilege of public performance for profit, but definitely is directed at being deprived, through the concerted action of appellees, of their inalienable right purchase their necessary supplies of music in a competitive market, free from price-fixing restraints of a monopoly dominated by a self-perpetuating board of directors.

The justice of this complaint of the entertainment industries is well illustrated by the discrimination practiced by the Society in giving licenses to newspaper-controlled broadcasting stations upon terms far more favorable than those accorded to stations not thus controlled. This fact is admitted by appellees' brief (p. 50), where attempt is made to gloss over the discrimination by the bald statement that—

> "These two types of contracts are the standard forms of contracts. They are entirely different. It cannot be said that either one discriminates against the other."

These discriminations are glaringly apparent upon the face of the respective agreements (R. 70, and 243; see also affidavits, Tison R. 212, and Mitchell, R. 242).

Appellees endeavor to obtain sympathy by reference to an investigation of their activities by the Department of Justice in 1926, but neglect to state all the facts (Appellees' brief pp. 5-6). The dismissal by the Department of Justice in August 1926, of the complaint against the appellee Society subsequently culminated on August 30, 1934, in the institution of an action against appellees charging violations of the United States Anti-trust laws. (R. 222, *et seq.*). This action is pending in the United States District Court for the Southern District of New York, Equity No. 78-388.

III.

Appellees Have Failed to Recognize the Fact That the State Prosecuting Officers are Not Charged With the Enforcement of Sections 2-A, 2-B and 6 of the Florida Statute; Consequently the Validity of These Sections Cannot be Tested in This Suit.

Appellants' main brief (pp. 56-62, incl.) demonstrates that Sections 2-A, 2-B and 6 of the statute are wholly disconnected from Section 1 and its dependent sections; that

no duties are laid upon the State enforcement officers with respect to these three sections; that the validity of these sections can be tested only in civil suits between the owners of public performance rights and those who are claimed to be infringing upon those rights. Consequently, the consideration of those sections is moot so far as the instant case is concerned.

This all important distinction is entirely disregarded by appellees in their bill of complaint, and in their brief. When the statute is thus separated into its component parts, it is readily seen that the only portions of the law with which this case is concerned are those denouncing as unlawful the price-fixing activities of the Society practiced in the State of Florida. Thus, it is clear that, so far as concerns the instant case, the Legislature of Florida was acting within its police powers in forbidding such activities. *Allen* v. *Riley*, 203 U. S. 347; *Patterson* v. *Kentucky*, 97 U. S. 501.

Respectfully submitted.

GEORGE COUPER GIBBS,
Attorney General of Florida;
TYRUS A. NORWOOD,
Assistant Attorney General of Florida;
LUCIEN H. BOGGS,
Jacksonville, Florida;
ANDREW W. BENNETT,
Washington, D. C.,
Counsel for Appellants.

SUPR

CARY D

GENE I
AMERI
LISHER

APPEAL F

MOTION
TO V.
OF B